(2)

Supreme Court U.S.
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No. 01-1503

In The

Supreme Court of the United States

CUYAHOGA COUNTY COURT OF COMMON PLEAS,
DOMESTIC RELATIONS DIVISION,

Petitioner,

v.

JOSEPH M. POPOVICH
AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), exceed Congress's enforcement authority under § 5 of the 14th Amendment, thereby failing to validly abrogate the state's 11th Amendment immunity from private damage claims?

2. Does the abrogation analysis of Title II of the ADA, 42 U.S.C. §§ 12131 to 12165 (2002), differ when an individual Title II claim is purportedly tied to due process concerns, rather than equal protection concerns?

ARGUMENT IN REPLY

Petitioner, Cuyahoga County Court of Common Pleas, Domestic Relations Division seeks this Court's review of whether Congress validly abrogated the state's 11th Amendment immunity by enacting Title II of the Americans with Disabilities Act. Concurrent with the filing of this Petition, the Respondent likewise filed a Petition for Certiorari, seeking review upon two issues:

1. Does a state waive its 11th Amendment immunity by its affirmative litigation conduct when it enters an appearance, defends on the merits for several years, seeks a judgment on the merits, and fails to raise the 11th Amendment immunity in the district court or in its original brief on appeal?
2. Did Congress exceed its authority under § 5 of the 14th Amendment when it enacted Title II of the Americans with Disabilities Act and abrogated the state's immunity from suit?

(See Petition for Writ of Certiorari of Joseph Popovich, Case No. 01-1517)

Subsequent to the filing of both Petitions for Writ of Certiorari (Case Nos. 01-1503 and 1-1517) this Court rendered the decision in *Lapides v. Board of Regents of the University System of Georgia*. The *Lapides* decision warrants the denial of the Domestic Relation's Court Petitions to the extent it require the Court to address the substantive arguments regarding congressional authority in abrogating a state's immunity from suit. Rather, the Court should grant Popovich's petition for certiorari on the issue of whether the state waived its immunity defenses by its

litigation conduct and remand the matter to the Sixth Circuit for consideration of the *Lapides* decision.[1]

In *Lapides*, this Court addressed the issue of whether the State waives its 11th Amendment immunity by virtue of its removal of state court proceedings to federal court. The Court's decision in *Lapides* clarifies confusion which had permeated 11th Amendment jurisprudence and was evident in the lower Court's decision. Justice Briar observed that "an interpretation of the 11th Amendment that finds waiver in the litigation conduct rests upon the amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and deny upon the State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages." *Lapides*, slip opinion on p. 6, citing *Wisconsin Department of Corrections v. Schact*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring). In holding that the Court had waived the 11th Amendment immunity by virtue of its litigation conduct, Justice Breyer and the unanimous Court reaffirmed the viability of *Clark*, *Gunter* and *Gardner*[2] on the sounder line of authority with respect to when litigation conduct waives the 11th Amendment immunity. (*Lapides*, slip opinion at p. 8).

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[1] The *Lapides* decision warrants the grant of Joseph Popovich's Petition for Certiorari in Case No. 01-1517 on issue Number 1. As set forth below, this Court should grant the Petition for Certiorari filed by Joseph M. Popovich on the issue of whether the State waives its 11th Amendment immunity by virtue of litigation conduct. The Court should then remand the matter back to the Sixth Circuit for further proceedings consistent with the *Lapides* decision.

[2] *Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast Line*, 200 U.S. 273 (1906); *Gardner v. New Jersey*, 329 U.S. 565 (1947).

Based upon the conclusion of this Court in *Lapides*, it is submitted that it would be inappropriate to address the issue of Congress's authority to abrogate the 11th Amendment immunity under Title II of the Americans with Disabilities Act until the Sixth Circuit has properly addressed the issue of whether the Defendants in this case have waived their immunity by virtue of their failure to raise the issue until their reply brief on appeal in the Sixth Circuit. Accordingly, as it relates to this Petition for Writ of Certiorari, it should be denied.

CONCLUSION

In light of the intervening decision of this Court in *Lapides*, and the clear conduct of the Defendants in failing to raise an 11th Amendment immunity bar, the Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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COURT OF COMMON PLEAS OF OHIO, CUYAHOGA COUNTY, DOMESTIC RELATIONS DIVISION AND THE UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (No. 01-1503 Pet. App. A1-A60) is reported at 276 F.3d 808.[1] The panel opinion (Pet. App. A63-A102) is reported at

[1] Throughout this brief, our references to the petition appendix will be to the appendix filed in *Cuyahoga County Court of Common Pleas* v. *Popovich*, No. 01-1503.

227 F.3d 627. The opinion of the district court (Pet. App. A105-A131) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 10, 2002. The petition for a writ of certiorari in No. 01-1503 was filed on April 8, 2002. The petition for a writ of certiorari in No. 01-1517 was filed on April 10, 2002. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. V 1999), addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. V 1999), addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

By its terms, the Disabilities Act's prohibitions on discrimination are enforceable against public entities through private suits. See, *e.g.*, 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act, Congress expressly abrogated the

States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B). The case also implicates the Disabilities Act's anti-retaliation provision, which prohibits discrimination against those who file complaints alleging violations of the Act or otherwise exercise the rights accorded by the law. 42 U.S.C. 12203.

Congress instructed the Attorney General to issue regulations implementing the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R. Pt. 35. One such regulation provides that "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. 35.160(b)(1); see also 28 C.F.R. 35.104 (defining "auxiliary aids and services" to include "[q]ualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listen-

ing systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments"). The public entity need not "take any action [under the auxiliary aids regulation] that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.164.

2. Following divorce proceedings, petitioner Joseph Popovich was awarded primary custody of his minor daughter. In August 1992, on an *ex parte* petition from Popovich's ex-wife, petitioner Domestic Relations Division of the Cuyahoga County Court of Common Pleas (Cuyahoga County Court) issued a temporary order removing Popovich's then eleven-year-old daughter from his home and enjoining Popovich from having any contact with her at all. Pet. App. A69, A109-110; 1 C.A. App. 450.

Popovich has a hearing impairment that makes it difficult for him to understand speech. In hearings during September and October 1992 to adjudicate the need for and continuation of the temporary *ex parte* order, the Cuyahoga County Court provided Popovich with a headset that amplified the speech of participants in the court proceedings. On October 23, 1992, Popovich informed the Cuyahoga County Court that the use of the headset had caused an ear infection and that it no longer provided effective amplification for his hearing impairment. The Cuyahoga County Court continued the proceedings until December 1992. On December 1, 1992, Popovich advised that an alternative method of communication would be necessary, in light

of his deteriorating hearing condition, and requested that the Cuyahoga County Court provide him with some type of instantaneous transcription process. The Cuyahoga County Court told Popovich that he must choose between proceeding with the custody hearing on the merits without an alternative form of hearing assistance, or continuing the *ex parte* order separating him from his daughter and scheduling a separate hearing to determine what accommodations needed to be made. Because Popovich was unable to hear, and thus to participate, in the custody proceedings, he elected the separate hearing. That hearing was scheduled for February 1993, but was never held. Pet. App. A109, A111-A113; 1 C.A. App. 299, 544.

On December 2, 1992, the United States Department of Justice notified Cuyahoga County Court that the Department had received a complaint from Popovich that the court was violating the Disabilities Act and that the Department was commencing an investigation. The Cuyahoga County Court then cancelled the custody hearing and refused to conduct any further proceedings pending the completion of the Justice Department's investigation, despite repeated requests by the Justice Department that proceedings not be delayed. In June 1993, over Popovich's objection and without a hearing, the Cuyahoga County Court extended indefinitely the *ex parte* order enjoining Popovich from having any contact with his daughter. Popovich appealed the order, but the state appellate courts dismissed his appeal, returning the case to the Cuyahoga County Court in February 1994. Pet. App. A113, A115, A128-A129; 1 C.A. App. 303; 3/31/98 Tr. 293, 302.

In October 1994, after a meeting with Popovich's attorney, the Cuyahoga County Court stated that it

would provide Popovich with an instantaneous transcription process during the custody hearing. The Cuyahoga County Court also modified its two-year-old *ex parte* order to permit Popovich to visit his daughter, with the permission and supervision of the guardian ad litem. No further custody proceedings were held for three years, however. In July 1995, the Cuyahoga County Court authorized Popovich's daughter to move out-of-state to live with her mother. Pet. App. A115-A117; 4/1/98 Tr. 338-339. When, in 1997, the Cuyahoga County Court finally resumed the custody hearing, Popovich regained full custody of his daughter. Pet. App. A117.

3. Popovich filed suit in March 1995 against the Cuyahoga County Court and the County of Cuyahoga in federal district court alleging violations of the non-discrimination and anti-retaliation provisions of the Disabilities Act.[2] The complaint sought an injunction ordering defendants both to provide an appropriate accommodation and to rule on Popovich's pending motion to terminate the *ex parte* injunction restricting his contact with his daughter. 1 C.A. App. 29. The complaint was amended six months later to add a claim for compensatory damages. *Id.* at 40-41.

On April 13, 1998, the jury returned a verdict in favor of Popovich. In special interrogatories, the jury found that the Cuyahoga County Court and Cuyahoga County had unlawfully discriminated and retaliated against Popovich. Pet. App. A135-A136; 4/6/98 Tr. 801-802. The jury awarded $400,000 in compensatory damages. Pet. App. A136. At no point before the jury's verdict did the

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[2] Popovich also sued a judge in his official capacity, but that defendant was dismissed from the case before trial. 4/2/98 Tr. 614.

Cuyahoga County Court invoke Eleventh Amendment immunity.

On April 23, 1998, the Cuyahoga County Court and Cuyahoga County filed a motion for a new trial, judgment as a matter of law, and remittitur. Pet. App. A105, A123, A135-A136. That motion did not assert Eleventh Amendment immunity. On July 28, 1998, while that motion was still pending, the district court issued an injunction ordering the Cuyahoga County Court and Cuyahoga County to provide Popovich with real-time captioning for any proceeding that required his active participation and prohibiting further acts of retaliation. *Id.* at A132-A134. Petitioner and Cuyahoga County filed a notice of appeal "from the Judgment Entry of July 28, 1998 awarding injunctive relief." 1 C.A. App. 46.

The district court subsequently issued an order granting judgment as a matter of law in favor of Cuyahoga County, but denying Cuyahoga County Court's requests for relief. On November 19, 1998, the court entered an amended damages judgment, solely against Cuyahoga County Court. Pet. App. A103. Cuyahoga County Court did not file a notice of appeal from either the original or the amended judgments awarding damages.

4. On appeal, Cuyahoga County Court did not raise a claim of Eleventh Amendment immunity in its opening brief. In its reply brief, the Cuyahoga County Court included a "cryptic," Pet. App. A71, and "abbreviated, afterthought reference to the Eleventh Amendment immunity," *id.* at A33. See also *id.* at A22 n.8.[3] The

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[3] In the midst of a discussion of *qualified* immunity, the Cuyahoga County Court referred to the Eighth Circuit's decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999), cert. dismissed,

court of appeals then directed the parties to submit supplemental letter briefs addressing the Eleventh Amendment issue. *Id.* at A33. The court, however, denied without explanation the United States' motion to intervene, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the law. Pet. App. A22 n.8.

The court of appeals reversed and remanded. Pet. App. A63-A102. It concluded that, despite Cuyahoga County Court's failure to invoke Eleventh Amendment immunity in a timely manner, the court could, in its discretion, address the constitutionality of an Act of Congress. The court then concluded that Title II of the Disabilities Act was not a "congruent and proportional" means of enforcing the Equal Protection Clause because it prohibits "a broad swath" of constitutional conduct, *id.* at A88, and because Congress's findings of discrimination against persons with disabilities were not supported by "evidence in the legislative history," *id.* at A96.

5. The en banc court of appeals vacated and remanded. Pet. App. A1-A60.[4] The court acknowledged that this Court, in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), had specifically reserved the question of whether the abrogation of Eleventh Amendment immunity for Title II was

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529 U.S. 1001 (2000), and invited the court of appeals to "declare Title II of the [Disabilities Act] unconstitutional as applied to the states." C.A. Reply Br. 34. Immediately thereafter, Cuyahoga County Court advised the court of appeals that resolution of that "federal constitutional issue * * * can be avoided" "in light of the record in this case." *Ibid.*

[4] The en banc court of appeals permitted the United States to intervene, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Congress's abrogation of the States' Eleventh Amendment immunity. Pet. App. A23 n.8.

valid. Pet. App. A10-A11. The court concluded that the reasoning of *Garrett* applied equally to the question whether Title II's abrogation could be sustained as appropriate legislation to enforce the Equal Protection Clause. *Id.* at A6-A9.

The court held, however, that "as applied" to Popovich's claim that he had been denied an accommodation needed to participate meaningfully in hearings involving the custody of his daughter, Congress's abrogation could be sustained as appropriate legislation to enforce the Due Process Clause. Pet. App. A11-A17. Because the jury instruction had been "based on equal protection principles," the court vacated the jury award and remanded for a trial on a theory of "unreasonable exclusion from judicial proceedings based on disability in a due process-type claim." *Id.* at A19.

Judge Moore, writing for herself and four other judges, concurred in part and in the judgment. Pet. App. A23-A31. While agreeing with the court's Due Process Clause holding, *id.* at A23, she also would have sustained Title II's abrogation as appropriate legislation to enforce the Equal Protection Clause. In her view, Congress's "express findings" relating to "a pattern of unconstitutional discrimination by the states" were supported by an "extensive study and record" that "the states have discriminated against the disabled in many aspects of governmental operations and that they may continue to do so." *Id.* at A26-A27, A29, A30. This "extensive record of constitutional violations in the states' provision of public services to persons with disabilities," *id.* at A29, demonstrated

that Title II's obligations were a "congruent and proportional" remedy, *id.* at A29-A31.[5]

Judge Ryan, writing for himself and five other judges, concurred in part and dissented in part, on the ground that Title II is not appropriate legislation to enforce either the Equal Protection or Due Process Clause. Pet. App. A31-A53.

ARGUMENT

Petitioner Cuyahoga County Court and petitioner Popovich are correct (No. 01-1503 Pet. 7-20; No. 01-1517 Pet. 15-19) that the question of Congress's power to abrogate the States' Eleventh Amendment immunity for claims under Title II of the Disabilities Act is an important question that may merit review by this Court at the appropriate time and in the appropriate case.[6] This, however, is not that case. To the contrary,

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[5] Judge Gilman filed a partial dissent in which he "fully concur[red] in the judgment of the court that upholds the constitutionality of Title II of the Americans with Disabilities Act," Pet. App. A54, but in which he also argued that Judge Merritt's participation in the en banc proceedings violated 28 U.S.C. 46(c). Pet. App. A53-A60.

[6] Since this Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), which invalidated the abrogation of Eleventh Amendment immunity for Title I of the Disabilities Act, the courts of appeals addressing the constitutionality of Congress's abrogation of Eleventh Amendment immunity for Title II of the Disabilities Act have reached differing results with varying degrees of analysis. The Fifth, Eighth, and Tenth Circuits have held that the abrogation for Title II suits cannot be sustained as valid Section 5 legislation. See *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001); *Randolph* v. *Rodgers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001); *Thompson* v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 122 S. Ct. 1960 (2002). The Ninth Circuit has upheld the abrogation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167 (2002). The Second Circuit has held that the

there are significant jurisdictional, statutory, and prudential barriers to granting plenary review here.

1. This case appears to be moot and, indeed, likely was moot at the time both the original court of appeals panel and the en banc court issued their decisions.

a. *The Claim For Money Damages*: The Eleventh Amendment question presented by petitioner Cuyahoga County Court to this Court is expressly confined to challenging the constitutionality of the Disabilities Act's abrogation of immunity for awards of money damages. The question presented does not assert a general immunity to suit or an immunity to injunctive relief in particular. See No. 01-1503 Pet. i (questioning Congress's authority to abrogate "Eleventh Amendment immunity from private damage claims").[7] Cuyahoga County Court, however, never filed a notice of appeal from the district court's damages judgment when it took its appeal to the Sixth Circuit. The propriety of the abrogation of immunity for money damages thus was never properly presented to the court of appeals and, consequently, has not been preserved for this Court's review.

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abrogation can be sustained in Title II cases if the government's action was undertaken with "discriminatory animus or ill will towards the disabled." *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 111 (2001).

[7] See also No. 01-1503 Pet. 7 ("private damage suits"), 8 ("private damage suits"), 9 ("private claims for damages"), 14 ("damage suits"), 16 ("money damages"), 20 ("private money damage claims"); No. 01-1517 Pet. 4 (in describing remedy awarded, only mentioning damages), 8 (same), 15 (noting that courts are divided on whether "states may be sued for money damages"). Contrast No. 01-1503 Pet. 19 (quoting question presented in *Alsbrook* v. *Arkansas*, No. 99-423, which asked whether Congress had power to abrogate "immunity from suit by individuals").

The only notice of appeal ever filed by Cuyahoga County Court exclusively identified the "Judgment Entry of July 28, 1998 awarding injunctive relief" as the order that was being appealed. 1 C.A. App. 46. Indeed, the notice of appeal includes a footnote reference explaining that the "Judgment Entry of April 13, 1998" —the jury's award of damages—"remains pending as the Court has not yet ruled on Defendants' Motion For A New Trial and Judgment As A Matter Of Law." *Id.* at 46 n.1. Cuyahoga County Court never subsequently filed a notice of appeal from either the original April 13, 1998, judgment awarding damages, or from the district court's later denial of its motion for a new trial or judgment as a matter of law, as embodied in the amended order awarding damages of November 19, 1998.[8]

Federal Rule of Appellate Procedure 3(c)(1)(B) provides that a notice of appeal must "designate the judg-

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[8] Cuyahoga County Court's first mention of an appeal of the damages judgment appears in its Civil Appeal Conference Statement, see 6th Cir. R. 33(b)(1), which was signed and dated on December 22, 1998—32 days after entry of the amended judgment. The Civil Appeal Conference Statement is not recorded on the Sixth Circuit's docket sheet. We have been advised by the Office of the Clerk for the Sixth Circuit that Cuyahoga County Court faxed that Statement to the court of appeals on December 22, 1998. Thus, even if that Statement were viewed as an attempt to amend the notice of appeal, it arrived too late to do so. See Fed. R. App. P. 4(a)(4)(B)(ii) and (d). In any event, an unpublished decision of the Sixth Circuit indicates that the court will not treat the Civil Appeal Conference Statement as a notice of appeal. *Harvey Invs., Inc.* v. *Toyota Motor Sales, U.S.A., Inc.*, No. 97-1925, 1998 WL 767080, at *6 n.4 (6th Cir. Oct. 23, 1998) (166 F.3d 1213 (Table)). See 6th Cir. R. 28(g) (an unpublished opinion may be cited if the decision has "precedential value in relation to a material issue in a case, and * * * there is no published opinion that would serve as well").

ment, order, or part thereof being appealed." Compliance with Rule 3(c) is a "jurisdictional prerequisite" to an appeal. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988); see also *Becker* v. *Montgomery*, 532 U.S. 757, 765-766 (2001) (Rule 3(c)(1)'s "specifications" of what a notice of appeal must contain are "jurisdictional provisions").

Furthermore, when a notice of appeal designates a particular interlocutory judgment or order, a court of appeals lacks jurisdiction over any other judgment or order. See, *e.g.*, *Parkhill* v. *Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002); *United States* v. *Glover*, 242 F.3d 333, 334-337 (6th Cir. 2001); *Lockett* v. *Anderson*, 230 F.3d 695, 699-701 (5th Cir. 2000); *Laurino* v. *Tate*, 220 F.3d 1213, 1219 (10th Cir. 2000); *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 185 n.2 (2d Cir. 1999); *Bogle* v. *Orange County Bd. of County Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998); *Garcia* v. *City of Chicago*, 24 F.3d 966, 969 n.4 (7th Cir. 1994), cert. denied, 514 U.S. 1003 (1995); *Lockary* v. *Kayfetz*, 917 F.2d 1150, 1157 (9th Cir. 1990). Thus, Cuyahoga County Court's notice of appeal from the award granting injunctive relief did not give the court of appeals jurisdiction over the separately entered damages judgment.

While Popovich did file a timely notice of appeal from the amended damages order, his appeal was limited to the dismissal of the County from the case and the denial of pre-judgment interest. He subsequently withdrew the claim against the County before decision, and he abandoned the pre-judgment interest claim by failing to brief it. Pet. App. A70. In any event, it is a "firmly entrenched rule" that, "[a]bsent a cross-appeal" from the damages judgment, Cuyahoga County Court could not "attack the [money judgment] decree with a view either

to enlarging [its] own rights thereunder or of lessening the rights of [its] adversary." *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479-480 (1999). Popovich's short-lived appeal thus did not afford the court of appeals jurisdiction over the damages judgment either.

In short, because Cuyahoga County Court failed to appeal or cross-appeal from the judgment awarding money damages, the court of appeals lacked jurisdiction over that judgment, and the constitutionality of Congress's abrogation of Eleventh Amendment immunity for damages is not properly preserved for this Court's review.

b. *The Claim For Injunctive Relief*: Cuyahoga County Court's notice of appeal did give the court of appeals jurisdiction to address its challenge to the judgment ordering *injunctive* relief. However, the common pleas proceedings to which Popovich was a party were terminated on April 24, 1998, with Popovich retaining custody of his daughter and all outstanding injunctions being vacated. That order was affirmed by the state court of appeals in November 1999. See *Whinsenant* v. *Popovich*, No. 74559, 1999 WL 1024205 (Ohio Ct. App. Nov. 10, 1999). Therefore, the claim for injunctive relief became moot while the appeal was pending in the court of appeals. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 68, 72 (1997). Furthermore, Popovich's daughter turned 18 on December 19, 1998 (1 C.A. App. 262), divesting the court of common pleas of jurisdiction over any current or future custodial dispute involving her. See *Maphet* v. *Heiselman*, 469 N.E.2d 92, 93-94 (Ohio Ct. App. 1984). Because Popovich's daughter—the youngest of his children, see 1 C.A. App. 450—has now reached the age of majority, the conflict between these parties is incapable of repetition. It does not appear that either of the parties

to this litigation brought those intervening developments to the attention of either the original panel or the en banc court.

The mootness of the case would appear to preclude this Court from addressing the Eleventh Amendment question. See *Calderon* v. *Ashmus*, 523 U.S. 740, 745 & n.2 (1998) (Court "must first address" whether there is a "case or controversy" before reaching Eleventh Amendment issue, because the Eleventh Amendment "is not coextensive with the limitations on judicial power in Article III."); see also *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771, 778-779 (2000) (standing and cause of action questions resolved before Eleventh Amendment); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (courts have "no[] license * * * to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest"); *Riley* v. *St. Luke's Episcopal Hosp.*, 196 F.3d 514, 523 (5th Cir. 1999) (standing issue poses "a more 'basic' jurisdictional requirement" and thus must be addressed in advance of an Eleventh Amendment claim). While, in other circumstances, this Court has held that courts may "choose among threshold grounds for denying audience to a case on the merits," *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999), well-established principles of constitutional avoidance counsel against unnecessarily addressing the constitutionality of Acts of Congress in cases where alternative means of disposing of the case are available at the threshold. See generally *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Moreover, because the mootness of the case destroys any jurisdictional foundation for the court of appeals' partial invalidation of an Act of Congress as

unconstitutional—which is "the gravest and most delicate duty that [a] Court is called upon to perform," *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981)—the court of appeals' decision should be vacated.

2. This case also contains a potential statutory bar to federal jurisdiction that is distinct from the Eleventh Amendment question presented and that could prevent resolution of that question in this case. Under the *Rooker-Feldman* doctrine (see *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)), federal district courts lack subject-matter jurisdiction over any action that "in essence, would be an attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts," *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 622-623 (1989). In addition to its statutory basis (28 U.S.C. 1257), the *Rooker-Feldman* doctrine is rooted in notions of comity and federalism that presume that state courts are willing and able to apply federal law and respect federal rights as well as their federal court counterparts. See *Feldman*, 460 U.S. at 484 n.16; see also *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 610-611 (1975).

Cuyahoga County Court raised *Rooker-Feldman* before the district court, which rejected the argument. Pet. App. A125-A128. Cuyahoga County Court renewed its argument in its initial brief to the court of appeals, C.A. Br. 19-21, but neither the panel nor the en banc court addressed it. Neither Cuyahoga County Court nor Popovich mentions the issue in its petition. The *Rooker-Feldman* doctrine, however, is a limitation on the courts' subject-matter jurisdiction that cannot be waived and must be addressed by this Court even if it is not raised by the other parties. See *Feldman*, 460 U.S. at 486-487; *Ace Constr.* v. *City of St. Louis*, 263

F.3d 831, 833 (8th Cir. 2001); *4901 Corp.* v. *Town of Cicero*, 220 F.3d 522, 527 (7th Cir. 2000); *Weekly* v. *Morrow*, 204 F.3d 613, 615 (5th Cir. 2000); *Hachamovitch* v. *DeBuono*, 159 F.3d 687, 696 n.2 (2d Cir. 1998).

Popovich's claims arise out of the actions of a common pleas court presiding over a judicial proceeding in which he was a party. Popovich's retaliation claim, which he describes (No. 01-1517 Pet. 3) as based on a "*de facto* stay of proceedings" in response to his filing of a complaint with the Justice Department, appears to implicate the *Rooker-Feldman* doctrine. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936); see also *Hagerty* v. *Succession of Clement*, 749 F.2d 217, 219-220 (5th Cir. 1984) (*Rooker-Feldman* bars federal court from hearing challenge to state court's decision to deny continuance), cert. denied, 474 U.S. 968 (1985).[9]

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[9] The courts of appeals are in accord that district courts are barred by *Rooker-Feldman* from hearing challenges that various interlocutory procedural orders by state courts violated a party's federal constitutional or statutory rights. See, *e.g.*, *Brown & Root, Inc.* v. *Breckenridge*, 211 F.3d 194 (4th Cir. 2000) (state court's refusal to stay proceeding and order arbitration); *Gentner* v. *Shulman*, 55 F.3d 87, 89 (2d Cir. 1995) (state court's disqualification of counsel); *Wright* v. *Tackett*, 39 F.3d 155, 157-158 (7th Cir. 1994) (state court's denial of request to intervene in foreclosure actions), cert. denied, 513 U.S. 1150 (1995); *Keene Corp.* v. *Cass*, 908 F.2d 293, 297 (8th Cir. 1990) (state court's discovery order); *Howell* v. *Supreme Court of Tex.*, 885 F.2d 308, 311 (5th Cir. 1989) (state judge's refusal to recuse), cert. denied, 496 U.S. 936 (1990).

Whether Popovich's discrimination claim is likewise barred is a more difficult question. In order for *Rooker-Feldman* to apply, the challenged action must be "judicial in nature," *Feldman*, 460 U.S. at 476. An "administrative" decision does not trigger the doctrine. *Id.* at 479. On the one hand, the decision on how to accommodate Popovich's disability was made by a judge and ultimately embodied in a court order. Pet. App. A112. On the other hand, the decision on how to comply with the Disabilities Act's requirement to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in" court proceedings, 28 C.F.R. 35.160(b)(1), was not inherently judicial. Cf. *Forrester* v. *White*, 484 U.S. 219, 229 (1988) (judge not entitled to judicial immunity when acting in administrative capacity, *e.g.*, "supervising court employees and overseeing the efficient operation of a court"); 4/1/98 Tr. 314, 316, 327 (testimony of court administrator that his general duties included addressing complaints under the Disabilities Act under the supervision of the administrative judge); 4/2/98 Tr. 421-422 (testimony of judge that he consulted with court administrator and administrative judge before deciding how to accommodate Popovich). In fact, the same obligation applies to all public entities. Cf. *Forrester*, 484 U.S. at 228 (noting that judicial immunity is less appropriate when the same tasks are performed by other branches of government).

There is little relevant authority addressing the distinction between judicial and administrative acts for purposes of triggering the *Rooker-Feldman* doctrine.[10]

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[10] Outside the context of regulating membership in the bar (the situation at issue in *Rooker* and *Feldman*), we are aware of only

Because of the difficulty and relative novelty of that question, the United States takes no position on the ultimate question of whether *Rooker-Feldman* bars Popovich's claims. But the existence of that potential non-constitutional and jurisdictional obstacle to this Court's review of the questions presented counsels strongly against granting these petitions. Indeed, this Court recently denied certiorari in another case that presented a similar challenge to Title II's abrogation of Eleventh Amendment immunity, but that also suffered from jurisdictional and prudential barriers to review. See *Thompson* v. *Colorado*, 122 S. Ct. 1960 (2002).

3. A logical antecedent to adjudicating the constitutional questions presented for review is determining whether the Cuyahoga County Court is an "arm of the state" entitled to Eleventh Amendment immunity. The Sixth Circuit concluded that the Cuyahoga County Court is an arm of the state, see Pet App. A75 (citing *Mumford* v. *Basinski*, 105 F.3d 264, cert. denied, 522 U.S. 914 (1997)). This Court's precedents strongly suggest otherwise.

Eleventh Amendment immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an "arm of the State." See *Alden* v. *Maine*, 527 U.S. 706, 756 (1999); *Lincoln County* v. *Luning*, 133 U.S. 529 (1890). Whether Cuyahoga County Court is an arm of the state is a question of federal law, that this Court reviews de

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two appellate decisions (coming out of the same circuit) that have analyzed the line between administrative and judicial actions, for purposes of *Rooker-Feldman*. See *Guarino* v. *Larsen*, 11 F.3d 1151, 1157-1160 (3d Cir. 1993) (civil rights challenge to revocation of judge's senior status); *Blake* v. *Papadakos*, 953 F.2d 68, 72-73 (3d Cir. 1992) (suit to enjoin state court from exercising administrative powers of a judge's office).

novo. See *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997); see also *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1645 (2002). Relevant factors to consider include the court's description under state law, the provenance of the court's officials, the functions of the court, the extent of control of the court's actions by the State, and the State's financial responsibility for the court or for any judgment entered. See *Doe*, 519 U.S. at 430; *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-45 (1994) (discussing *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401-402 (1979)).

Those factors strongly indicate that the Cuyahoga County Court is not an arm of the state. First, under Ohio law, a court of common pleas is defined as a "political subdivision" for purposes of tort liability. See *Dalton* v. *Bureau of Criminal Identification & Investigation*, 530 N.E.2d 35 (Ohio Ct. App. 1987) (interpreting Ohio Rev. Code Ann. § 2743.01 (Anderson 2000)); *Tymcio* v. *State*, 369 N.E.2d 1063 (Ohio Ct. App. 1977) (same); see also *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (relying on the same Ohio statute in concluding that Ohio school districts are not arms of the state).

Second, the provenance of the courts' officers also evidences a local, rather than state-based, entity. The judges of the court of common pleas are elected by county electors. See Ohio Rev. Code Ann. § 2301.01 (Anderson 2001). They must also be residents of the county in which they are elected. See *ibid.*

Third, and most significantly, the money judgment entered in this case would not be enforceable against the State treasury. That factor "is of considerable importance" to the arm-of-the-state inquiry. *Doe*, 519 U.S. at 430; see also *Hess*, 513 U.S. at 47, 51. Under

Ohio law, the State is under no obligation to pay the judgment entered against the Cuyahoga County Court. When judgments are awarded against a "political subdivision"—a state law term interpreted to include courts of common pleas—

> [s]uch judgments shall be paid from funds of the political subdivision that have been appropriated for that purpose, but, if sufficient funds are not currently appropriated for the payment of judgments, the fiscal officer of a political subdivision shall certify the amount of any unpaid judgments to the taxing authority of the political subdivision for inclusion in the next succeeding budget.

Ohio Rev. Code Ann. § 2744.06(A) (Anderson Supp. 2001). The court of common pleas does not have the authority to tax. It is the *county* that is authorized to levy a special property tax to pay for the court's expenses. *Id.* § 5707.02 (Anderson 2002). While the common pleas court does have the authority to assess various fees against litigants, all fees received by the court must be given to the county. *Id.* § 325.27 (Anderson 1998). And while the State and county share the costs of judges' salaries, *id.* §§ 141.04, 141.05, 141.07 (Anderson 2001), it is the county that is obliged to provide a courthouse and pay all expenses "reasonably necessary for its operation," including all the costs of court personnel and services. *Id.* § 307.01(B) (Anderson Supp. 2001); Ohio Op. Att'y Gen. No. 89-029, 1989 WL 455369 (May 15, 1989). Thus, it appears that it would be the county—not the State—that ultimately would be

responsible for providing the funds to pay the judgment in this case.[11]

The fourth factor—the court's function—does nothing to undercut its local character. Localities, as well as States, have traditionally operated courts. See, *e.g.*, *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (Mayor's Court); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) (Police Court).

Only the question of control weighs in favor of "arm of the state" status. State law authorizes both the state legislature and the state supreme court to remove judges from their positions. See Ohio Rev. Code Ann. §§ 2701.11-2701.12 (Anderson 2000). And the court's judicial decisions may be reviewed by the state supreme court. But those considerations alone are not dispositive. Cf. *Hess*, 513 U.S. at 44, 47-48 (fact that States appointed and removed commissioners and that governors could veto entity's actions were not sufficient to render the entity an arm of the state).

The Sixth Circuit's decision here, applying its earlier decision in *Mumford*, did not address this Court's factors. Instead, the court focused on the fact that the Cuyahoga County Court was created by state law. See 105 F.3d at 268-269. But the same is true of counties,

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[11] This understanding is confirmed by the county's duties to defend and to indemnify court personnel. The county must defend suits brought against the common pleas judges and other court personnel. Ohio Rev. Code Ann. § 309.09 (Anderson Supp. 2001); Ohio Op. Att'y Gen. No. 85-014, 1985 WL 204483 (Apr. 9, 1985). And the county must indemnify the judges and other personnel for "any damages" awarded by a "state or federal court" if the person was acting "in good faith and within the scope of his employment or official responsibilities." Ohio Rev. Code Ann. § 2744.07(A)(2) (Anderson 2000); see Ohio Op. Att'y Gen. No. 88-055, 1988 WL 428848 (Aug. 25, 1988).

cities, and school districts—yet they indisputably do not enjoy Eleventh Amendment immunity, even though they exercise a "slice of state power." *Lake County Estates*, 440 U.S. at 401. Indeed, the entire analysis in *Mumford* appears to have been skewed by the court's belief that a court of common pleas had to be either an arm of the state or "an appendage" or "extension" of the county government. 105 F.3d at 268. It did not address the possibility that a court of common pleas, like a school or water district, could be an entity apart from the county and yet still not be entitled to the State's immunity.

Because it is highly dubious that petitioner is an "arm of the state" entitled to invoke the States' Eleventh Amendment immunity, this case is ill-suited for consideration of the important question of the constitutionality of the Disabilities Act's abrogation of that immunity. At a minimum, the prospect of this Court's declaring unconstitutional a provision of federal law duly enacted by the Congress and signed by the President based on a constitutional provision's hypothesized application—especially when that application is subject to substantial doubt—raises profound separation-of-powers concerns that lie at the core of the *Ashwander* principle of constitutional avoidance, see *Ashwander*, *supra*, and that likewise should weigh heavily in this Court's exercise of its certiorari jurisdiction. Cf. *Garrett*, 531 U.S. at 360 n.1 (dismissing as improvidently granted the question whether Title II validly abrogated Eleventh Amendment immunity, when there was an open question whether Title II applied to the conduct at issue).

4. Petitioner Popovich also seeks this Court's review (No. 01-1517 Pet. 6-15) of the question whether the Cuyahoga County Court waived its Eleventh Amend-

ment immunity by failing to assert it at any stage of this litigation, prior to its "cryptic" and "abbreviated, afterthought reference" to it, Pet. App. A71, A33, near the end of its court of appeals reply brief. We agree that there is a substantial argument that the Cuyahoga County Court did waive its Eleventh Amendment immunity (if any). Its belated and opaque assertion of the claim threatens the type of "inconsistency, anomal[ies], and unfairness" and "unfair tactical advantage[s]" that this Court recently held the Eleventh Amendment does not condone. *Lapides*, 122 S. Ct. at 1644-1645; see also *Wisconsin Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) ("In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal."). At a minimum, the substantiality of the waiver question presents yet another reason why this case is an inappropriate vehicle for consideration of the important constitutional question presented. In light of the other substantial jurisdictional and prudential problems plaguing this case and the uncertainty this Court's very recent decision in *Lapides* casts over the circuit conflict Popovich identifies (No. 01-1517 Pet. 11-14), a denial of certiorari on the waiver question would not be inappropriate.[12]

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[12] As Popovich acknowledges (No. 01-1517 Pet. 6 n.1), the court of appeals' opinion reflects a level of ambivalence about waiver that counsels against plenary review of the question.

The United States, however, does not oppose Popovich's suggestion (No. 01-1517 Pet. 14) that the court of appeals' decision be vacated and the case remanded for reconsideration in light of *Lapides*. This Court recently undertook a similar disposition in a case presenting an Eleventh Amendment challenge to the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* See *Montgomery* v. *Maryland*, 122 S. Ct. 1958 (2002). Such a remand would also be appropriate to afford the parties the opportunity to call the court of appeals' attention to the mootness and other jurisdictional problems identified above. Indeed, vacatur is particularly appropriate because this case involves the partial invalidation of an Act of Congress by a court that lacked jurisdiction to assume that grave task.

CONCLUSION

The petitions for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of the mootness and jurisdictional problems discussed in this brief, or in light of *Lapides* v. *Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002). In the alternative, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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